

TITLE: CIB 95-19 Affirmative Action Implications for USAID Programs

July 25, 1995

MEMORANDUM FOR ALL CONTRACTING OFFICERS AND NEGOTIATORS

TO: Distribution List FAC

FROM: DAA/M, Michael Sherwin, Procurement Executive

SUBJECT: Affirmative Action Implications for USAID Programs

CONTRACT INFORMATION BULLETIN 95-19

The Supreme Court recently issued a close decision in a case that may ultimately have significant implications for USAID's affirmative action programs, particularly as they bear upon its acquisition and assistance instruments. In a 5-4 split decision of the case *Adarand v. Pena*, the court found that:

"All racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling government interests."

The *Adarand* decision does not immediately affect USAID efforts involving the 8(a) program, the Gray Amendment, subcontracting requirements or minority set-asides. The decision does, however, raise the possibility of a judicial challenge to any one of the above programs under its strict judicial scrutiny standard. The Department of Justice has prepared preliminary legal guidance to all Federal agencies on the implications of the Court's decision on their respective programs. That guidance is being reviewed by the USAID Office of General Counsel in order to assess the impact of the *Adarand* decision on USAID programs.

In the meantime contracting personnel should continue to conduct their procurements under the currently prescribed policies and programs. Until we have further guidance, we will deal with any such challenges as they arise in specific cases.

We will keep you informed of significant developments in this area.